IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLY (PETITIONER ON BEHALF OF SALTER D. WORDEN) AND SALTER D. WORDEN, APPELLANTS,

vs.

THE STATE OF CALIFORNIA, AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, APPELLEES.

Brief of Appellees Upon Their Motions to Dismiss the Appeal, and to Affirm the Order Appealed from.

STATEMENT OF CASE.

This an appeal from an order of the United States Circuit Court, Ninth Circuit, Northern District of California, denying an application made on behalf of appellant Worden, for a writ of *habeas corpus* directed to the appellee Aull.

The appellant, Salter D. Worden, was convicted in the Superior Court of the County of Yolo, State of California, of the crime of murder in the first degree, and was sentenced to be hanged. He appealed to the Supreme Court

of the State of California from the judgment of conviction, and from an order of the trial court denying his motion for a new trial. Both the judgment and order appealed from were affirmed.

People *vs.* S. D. Worden, 113 Cal. 569.

He is now in the custody of appellee Aull, pending and for execution under said judgment of conviction and by virtue of the process of said Superior Court, issued in accordance with said judgment of conviction and the laws of California.

Secs. 1217 and 1227, Penal Code of California.

Grounds of the Application.

The petition in this case presents but two alleged grounds for the issuance of the writ. They are as follows:

First. That Worden was convicted without due process of law, in this: that the evidence adduced against him at the trial was insufficient to sustain a verdict of murder in the first degree; that it would sustain no greater verdict than that of murder in the second degree; that it was the duty of the trial court, under the laws of California, to submit to the jury for its determination the question of the degree of murder of which the said Worden was guilty; and that the court—

> "only submitted to said jury the question as to whether or not Worden was guilty of murder in the first degree and would not and did not permit said jury to determine the question of the degree of murder therein or to find the said Worden guilty of murder in the second degree."

Second. That the crime of which Worden was convicted was one of which the State courts had no jurisdiction, but was an offense against the laws of the United States and exclusively cognizable in the Federal courts.

POINTS AND AUTHORITIES.

I.

The Alleged Denial to Worden of Due Process of Law.

In considering this portion of the petition for the writ, it is obvious:

First. That *if* the law of California required the submission to the jury of the question of the degree of Worden's crime, and *if* the trial court failed to so submit that question, the sole result was an error in that court's administration of the law of the State, and no defect in the law itself.

Second. That *if* the court did fail to submit to the jury the question of the degree of Worden's crime, the decision of the Supreme Court of the State sustaining the action of the lower court, shows conclusively that the law of California did not, under the circumstances developed in Worden's case, require the submission of this question to the jury.

Therefore, no Federal question is here presented.

If error was committed in the administration of the State laws, that constitutes no ground for Federal intervention. The writ of *habeas corpus* is not "a proceeding for the correction of errors."

In Re Fredericks, 149 U. S. 70, 75.
Ex Parte Parks, 93 U. S. 18.
Ex Parte Siebold, 110 U. S. 371.
Ex Parte Rowland, 104 U. S. 604, 612.
Ex Parte Yarborough, 110 U. S. 651.
Ex Parte Crouch, 112 U. S. 178.
In re Coy, 127 U. S. 731, 756.
Davis *vs.* Brawn, 133 U. S. 333.
In re Wood, 140 U. S. 278, 287.
In re Jugiro, 140 U S. 291, 297.
In re Tyler, 149 U. S. 164, 180.

In re Swan, 150 U. S. 637.
U. S. *vs.* Pridegen, 153 U. S. 48.
Anderson *vs.* Swartz, 156 U. S. 272, 276.
Bergeman *vs.* Backer, 157 U. S. 655, 659.
In re Belt, 159 U. S. 95.

On the other hand, the determination by the State Courts that no such error was committed is conclusive upon the Federal Courts. It is only where the State laws themselves are so defective as to violate or conflict with some provision of the Federal Constitution or laws, that the United States courts can intervene. Where, however, the State laws are free from objection their administration rests solely with the State courts.

Leeper *vs.* Texas, 139 U. S. 462, 467 and cases cited.
Bank of Hamilton *vs.* Dudley, 2 Peters, 493.
Gut *vs.* Minnesota, 9 Wall. 35.
Leavenworth *vs.* Barnes, 94 U. S. 70.
Railroad Company *vs.* Georgia, 98 U. S. 359, 365, 366.
Lincoln County *vs.* Lunning, 133 U. S. 529.
In re Duncan, 139 U. S. 449, 462.
Pittsburg C. C. & S. L. R. Co. *vs.* Backus, 154 U. S. 421.

The decision of the Supreme Court of California upon this particular phase of Worden's case is as follows:

> "The court prepared and gave to the jury three forms of verdict, and it is contended by appellant that in doing so the court erroneously neglected to give, as one form, 'guilty of murder in the second degree.' As to this matter the bill of exceptions shows that the judge said to the jury: 'There have been prepared for you, gentlemen, three blank forms of verdict which, by consent of counsel, you will be allowed to take to your juryroom;' also, that 'no objection was made by the defendant or his counsel

in response to such charge by the court relative to such forms of verdict, defendant's counsel remaining silent;' also, that 'no instruction was, upon the trial of this cause, requested by the defendant or his counsel as to what verdicts the jury could render or as to what constituted either the crime of murder in the first degree, murder in the second degree, or manslaughter, nor was the court requested by the defendant or his counsel to instruct the jury that it was within their province to find the defendant guilty of any lesser crime than the crime charged in the information.' Moreover, it is plain from the evidence introduced by appellant, and the instructions asked by him, that he presented his case entirely upon the theory that he did not do the appalling and most 'horrible' acts ascribed to him, and did not participate in such acts—not that the acts, if proven, would not constitute murder in the first degree. In the general charge the judge gave the statutory definition of murder in the second degree, and did not refuse any instruction asked upon the subject by appellant. Under these circumstances it was not the duty of the judge to affirmatively suggest to the jury that they might convict appellant of a lesser offense when not asked by appellant to do so, and when such suggestion apparently would have been against appellant's wishes; and no error was committed by not doing so."

People *vs.* Worden, 113 Cal. 574, 575.

II.

The Crime of which Worden was Convicted is not Exclusively or at all Cognizable by the Federal Courts.

It is alleged in the petition that Worden was convicted of the murder of one Samuel C. Clark, which murder was committed by derailing a train of which Clark was the engineer; that this train—

> "was not a regular freight or passenger train of the corporation, Southern Pacific Company, operating said piece of railroad above described, but was in

> truth and in fact a special train; that aside from its necessary crew of employees who were conducting the same, consisting of said Clark, as engineer, of a fireman, a conductor, two brakemen twenty-two United States soldiers and one other person, and that there was upon said train a considerable amount of United States mail which had been delayed in transmission, and that the effect of the derailment of said train, . . . constituted an obstruction or stopping of the transmission of the United States mail, and was a restraint and retarding of the interstate commerce of the United States,—that is to say, the commerce carried on between the State of California and other States of the Union—and that by reason thereof it appears from said record that the offense committed by said Worden was, if anything, an offense against the laws of the United States, and in contravention of the laws of the United States, and particularly of Sections 5440 and 3995 of the Revised Statutes of the United States, and of an Act of Congress of July 2, 1890, entitled 'An act to prevent Trusts and monopolies;'" and—

that the State of California—

> "assumed to try and did try the said Worden for an offense or by reason of an offense made solely punishable by the laws of the United States" (Rec. pp. 4 and 5).

It is further alleged in substance that the crime of which Worden was convicted was a murder of that character which was not the result of intention, but was "that murder which is due to the fact that by the commission of a felony the death of a person results;" that the felony from the commission of which the death in question resulted was not and could not have been a felony under the laws of the State of California but "was the commission of a crime or offense against the laws of the United States and in contravention of its statutes"—from which it is undoubtedly intended that the inference should follow that the resulting murder was

not a murder at all under the laws of California, although two courts of that State have so declared it (Rec., p. 5).

Then it is alleged that the train in question "was exclusively engaged in the carrying or transportation of the mail of the United States" and was guarded by Federal troops, pursuant to orders of the President of the United States (Rec., p. 5).

From all of this it is alleged—

> "that, therefore, it appears affirmatively from said record that the offense committed, if any offense was committed by the said Worden, was solely cognizable in the courts of the United States, who had and have exclusive jurisdiction thereof;"

and that the State courts acted without jurisdiction (Rec., pp. 5 and 6).

Section 5440 of the Revised Statutes of the United States, Title "Crimes," relates to the crime of conspiracy to commit an offense against or to defraud the United States.

Section 3995 of the Revised Statutes of the United States, Title "The Postal Service," relates to the crime of obstructing the mail.

By "An Act to Prevent Trusts and Monopolies" referred to in the petition is undoubtedly meant the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." (Supplement of Revised Statutes of the United States, Vol. I, Second Edition, pp. 762–764.) This act relates solely to contracts, combinations—"in the form of trusts or otherwise"—and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." Whether it has any bearing upon any of the crimes of which Worden became guilty by reason of his participation in the derailment of the train in question is immaterial, as neither it nor any of the Federal statutes cited relates in any way to the crime of murder, of which Worden was convicted.

The "Record" referred to in the petition is that of Worden's case in the Superior Court of Yolo County, California, where he was tried and convicted.

Section 753 of the Revised Statutes of the United States provides that:

> "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court testify."

Worden is "in jail." Therefore, unless those allegations of his petition under consideration bring his case within one or more of the special instances enumerated in the above quoted section, they present no ground for the issuance of the writ.

He is not under these allegations "in custody under or by color of the authority of the United States" or "committed for trial before some court thereof."

He is not, under these allegations, "in custody for an act done or omitted *in pursuance* of a law of the United States, or of an order, process or decree of a court or judge thereof."

He is not, under these allegations, "a subject or citizen of a foreign state."

It is not, under these allegations, necessary to bring him into court to testify.

Each of these propositions is too plain for argument.

Our inquiry then is narrowed down to one question: Is he, under the allegations which we are considering, "in custody in violation of the Constitution or of a law or treaty of the United States?"

The reasoning of the petitioner is evidently this: That Worden's crime was not murder; that it was either conspiracy to commit an offense against the United States (Section 5440, Revised Statutes U. S.), or obstructing the mails (Sec. 3995, Revised Statutes U. S.), or interfering with interstate commerce (Act of July 2, 1890), or either or all of them; that each of these offenses are offenses against the United States, not against the State of California, and are cognizable exclusively in the courts of the United States; and that, therefore, the State courts had no jurisdiction of any crime of which Worden was guilty, and his conviction of murder was without due process of law.

A.

Worden was Tried for a Breach of the State, not of the Federal Laws.

It is familiar law that an act may be both an offense against the laws of the United States and of a State; and that the same act may embrace two or more offenses.

Fox *vs.* The State of Ohio, 5 How. 410, 434.
United States *vs.* Marigold, 9 How. 560.
Moore *vs.* Illinois, 14 How., 13, 19, 20.
Ex Parte Siebold, 100 U. S. 371, 389, 391.
Cross *vs.* North Carolina, 132 U. S. 131, 139.
In Re Loney, 134 U. S. 372, 375.

A case directly in point is that of Cross *vs.* North Carolina, 132 U. S. 131, 139, *supra*. There the plaintiff in error, the President of a National Bank, and another, were convicted in the courts of North Carolina of forging a promissory note payable at the bank in question. The defendants filed a joint plea in abatement, contesting the jurisdiction of the

State court upon the ground, in substance, that the note forged was entered upon and in the books of the bank, and placed among its assets by the defendant—

> "with the intent to deceive the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examine into the affairs of the bank."

In the opinion of this court (which was unanimous) it was said:

> "The plea in abatement was evidently drawn with reference to Section 5209 of the Revised Statutes, Title, National Banks. That section provides, among other things, that every president, director, cashier, teller, clerk, or agent of any association . . . who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent, in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.
>
> "It is contended that the courts of the United States have exclusive jurisdiction to try the defendants for having made the false entries on the books of the bank, with the intent stated in the plea; that the forgery in question is an integral, essential element in such entries, which were false only because based upon the forged notes; that the defendants cannot be tried for the false entries after being tried for the forgery; consequently, a recognition of the right of the State court to try them for the latter offense will defeat the jurisdiction of the Federal court to try them for the former offense. In other words, that where exclusive jurisdiction is given to the courts of the United States to try an offense, the State court cannot exercise jurisdiction in respect to

any particular act constituting an essential ingredient of that offense, although the commission of such act is made a crime against the State.

"The fallacy of this argument is in assuming that the offense described in Section 5209 of the Revised Statutes, namely, the making by an officer or agent of a national banking association of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to deceive its officers or any agent appointed to examine its affairs, necessarily involves the crime of forgery, of which the defendants were found guilty. If the notes in question had not been forged, but, with or without the consent of the obligors, had been temporarily placed by the defendant among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, they could have been punished under Section 5209. On the other hand, the crime defined in Section 1029 of the Code of North Carolina would have been complete, if the defendants simply made and forged, or willingly assented to the making or forgery of the notes described in the indictment, with intent to defraud, and did not follow it up by committing the crime against the United States of making false entries in respect thereto upon the books of the bank, with the intent to deceive the agent designated to examine its affairs. *The crime against the State could not be excused or obliterated by committing another and distinct crime against the United States.*"

And again:

"The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in United States *vs.* Marigold, 9 How. 560, 569; Fox *vs.* Ohio, 5 How. 410, 433; Moore *vs.* Illinois, 14 How. 13, 19; and *Ex Parte* Siebold, 100 U.

S. 371, 390; in the first of which cases it was said that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' If it were competent for Congress to give exclusive jurisdiction to the Courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority which the States have always exercised of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general government to examine its affairs, it results from the fact that they are amenable to the laws of the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offense committed within its limits and against its laws.

This case and the case at bar differ very slightly in principle, the only difference being that the attempt to bring Worden's offense within the exclusive jurisdiction of the Federal courts is less plausible than that made in the Carolina case.

Here, according to the petition itself, Worden's one act resulted in at least three offenses against the Federal laws—conspiracy, obstructing the mails, and interfering with interstate commerce. In addition to these, the courts of California have decided that the same act resulted in an infraction of the State laws, viz.: in the crime of murder.

As there are unobjectional laws upon the California statute books defining murder and prescribing its punishment, and as it is the exclusive right of each State through its own tribunals to administer its own laws and to determine whether or not they have in any given instance been violated, it is very evident that, so far as this portion of the petition is concerned, the application for the writ was properly denied.

B.

Furthermore, the Federal courts have no jurisdiction whatever over the crime for which Worden was tried and of which he was convicted.

Worden was tried for and convicted of murder.

> "The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States."
>
> Manchester *vs.* Massachusetts, 139 U. S. 240, 262.
> United States *vs.* Hudson, 7 Cranch, 32.
> United States *vs.* Coolidge, 1 Wheat. 416.
> United States *vs.* Beavans, 3 Wheat. 336.
> United States *vs.* Reese, 92 U. S. 214, 216.
> United States *vs.* Hall, 98 U. S. 343, 345.
> United States *vs.* Britton, 108 U. S. 199, 206.
> Jones *vs.* United States, 137 U. S. 202, 211.
> United States *vs.* Eaton, 144 U. S. 677, 687.

In United States *vs.* Reese et al., 92 U. S. 214, *supra*, the defendants were indicted in the United States Circuit Court for the District of Kentucky for refusing to receive and count at a municipal election in the State of Kentucky "the vote of William Gassen, a citizen of the United States, of African descent." This court, in an elaborate opinion delivered by Mr. Chief Justice Waite, decided that the circuit court properly sustained demurrers to the indictment, as Congress had not "as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment." (Opinion, pp. 221, 222.)

In the course of the opinion it was said:

> "If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."
>
> (Opinion, p. 216), citing U. S. *vs.* Hudson, *supra*.

The other cases cited involve similar questions and are to the same effect.

Has Congress ever conferred upon the Federal courts jurisdiction over the crime of murder committed under the circumstances set out in the petition herein?

An examination of the Federal Statutes shows conclusively that it has not.

It is not pretended that Worden's claim to Federal jurisdiction is based upon any more substantial ground than the fact that the train of which the deceased Clark was engineer was, at the time of its derailment and Clark's resulting death, engaged exclusively in the transportation of mail and was under a guard of Federal troops acting in pursuance of orders from the President.

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States; . . . "

Section 711, Revised Statutes United States, title, "The Judiciary."

The District Court shall have jurisdiction as follows:

"First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section forty-four hundred and twelve, title 'Crimes;' . . . "

Section 536, Revised Statutes United States, title, "The Judiciary."

"The circuit courts shall have original jurisdiction as follows:

. . . . . .

"Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

Section 629, Revised Statutes United States, title, "The Judiciary."

"Every person who commits murder:

"First. Within any fort, arsenal, dockyard, magazine, or in any *place or district of country* under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who, upon any such waters, maliciouly strikes, stabs, wounds, poisons, or shoots, at any other

> person, of which striking, stabbing, wounding, poisoning, or shooting, such other person dies, either on land or at sea, within or without the United States, shall suffer death."

These are the Federal laws relating to the Federal jurisdiction of murder. Obviously they do not include the murder of which Worden was guilty. Moreover, Section 5328 of the Revised Statutes of the United States, title, "Crimes," expressly provides that—

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof;"

and, as we have seen, merely because an act constitutes an offense against the Federal laws, it by no means follows that the same act does not constitute an offense against and is not punishable under the laws of a State.

However, it is perfectly clear that the State and Federal jurisdiction of the crime of murder do not conflict at any point; for that crime is only congnizable in the Federal courts when the *place* where it is committed is *exclusively* within Federal jurisdiction, and without the jurisdiction of any of the States. An apparent exception to this rule may be found where a person is killed by an officer of the Federal Government in pursuance of his duty, Cunningham *vs.* Neagle, 135 U. S., p. 1; but this is not really an exception, as, in such cases, the courts proceed upon the theory that there has been no violation of a State law, the prisoner being—

> "in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof."
>
> Section 753, Revised Statutes United States.

The case of United States *vs.* Bevans, 3 Wheat. 336 (cited *supra*) defines the extent of the jurisdiction of Federal courts in murder cases, and is directly in point here.

In that case the defendant, William Bevans, was indicted for murder, in the United States Circuit Court for the District of Massachusetts.

> "At the trial, it appeared in evidence, that the offense charged in the indictment was committed by the prisoner . . . on board the United States ship of war Independence, rated a ship of the line of seventy-four guns, then in commission, and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine, duly enlisted, and in the service of the United States, and was acting as sentry, regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was, at the same time, duly enlisted, and in the service of the United States as cook's mate on board of said ship. The said ship was, at the same time lying at anchor, in the main channel of Boston harbor, in waters of a sufficient depth, at all times of tide, for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean."

Chief Justice Marshall, who delivered the unanimous opinion of this court, said:

> "The indictment appears to be founded on the 8th section of the 'Act for the punishment of crimes against the United States.' . . .
>
> "To bring the offense within the jurisdiction of the courts of the Union, it must have been committed in a river, &c., out of the jurisdiction of any State. It is not the offense committed, *but the bay in which it is committed*, which must be out of the jurisdiction of the State. If, then, it should be true, that Massachusetts can take no cognizance of the offense; yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offense to its courts. *If there be a common jurisdiction the crime cannot be punished in the courts of the Union.*"

United States *vs.* Bevans, 3 Wheat., pp. 386, 387.

The opinion then enters into a thorough consideration of the question, and concludes:

> "Upon these reasons the court is of opinion, that a murder committed on board a ship of war lying within the harbor of Boston, is not cognizable in the Circuit Court for the District of Massachusetts; which opinion is to be certified to that court." (Opinion, p. 291.)

See also United States *vs.* Wiltberger, 5 Wheat. 76.

If the fact that the murder was committed on board of a Federal man-of-war by a marine in the active service of the United States Government did not serve to confer jurisdiction upon the Federal courts, certainly the fact that the murder in this case resulting from the derailing of a train carrying United States mail under an escort of Federal soldiers would not serve to confer such jurisdiction. Neither Worden nor the deceased Clark was in any way connected with the Federal Government; and the murder was obviously an offense against the laws of California, and has been conclusively so determined by the California courts.

III.

It was discretionary with the circuit court to deny the application for a writ of habeas corpus without determining the merits of the points involved.

This court has, and the circuit court had, judicial knowledge of the fact that Worden has availed himself "of his right to have the action of the trial court reviewed in the highest court of the State."

In re Wood, 140 U. S. 278, 286.

Furthermore, it affirmatively appears from the petition that the Record of the trial court would show all of the

matters alleged in the petition. In fact, the petition is based solely upon what it is claimed that the Record would show, and in addition to the prayer for the writ of *hebeas corpus* it contains a prayer for the issuance of a writ in the nature of *certiorari*, to compel the Superior Court of Yolo County, California, to certify said Record to the United States Circuit Court, there to be used for the purpose of substantiating the allegations of the petition.

It follows that the questions presented by this appeal could and should have been presented to the State courts for determination; and if determined contrary to the contention of appellants, could and should be brought up to this court by writ of error. Under such circumstances the Federal courts may, in their discretion—

> "require the prisoner to seek a review by writ of error instead of resorting to the writ of *habeas corpus*; and except in extraordinary cases presenting special and peculiar facts and circumstances, it is the better and usual practice to do so."

In re Frederick, 149 U. S. 70.
Ex Parte Royall, 117 U. S. 241.
In re Wood, 140 U. S. 278, 290.
New York *vs.*. Eno, 155 U. S. 100.
Pepke *vs.* Cronan, 155 U. S. 100.
In re Belt, 159 U. S. 95, 100.
Whittier *vs.* Tomlinson, 160 U. S. 231, 242.

The order appealed from should be affirmed.

Respectfully submitted.

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For Appellees.